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Volkswagen Group Malaysia Sdn Bhd v Loo Chay Meng

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO
24NCC-86-03 OF 2015
LAU BEE LAN J
29 DECEMBER 2015

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Civil Procedure — Injunction — Injunction to restrain — Setting aside — Defendant filed winding up petition without judgment — Plaintiff applied for injunction to restrain defendant — Defendant applied to set aside injunction order — Whether winding up petition served — Whether plaintiff's application academic — Whether court had jurisdiction to grant injunctive relief

D

Civil Procedure — Originating summons — Declaration — Application to amend summons — Plaintiff applied for declaration that plaintiff not responsible for further warranties — Plaintiff applied for amendment of summons — Whether defendant breached terms of extended warranty — Whether warranty voided — Whether plaintiff entitled to declaration — Whether defendant opposed amendment of summons

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The defendant had bought a car from the plaintiff with a warranty for the first two years by the plaintiff and was extended for three years under the 'Extended Warranty Policy' ('the EWP') by Allianz General Insurance Co (M) Bhd. The defendant alleged that the vehicle was still under warranty and claimed for refund of RM2,973 as an amount outstanding from the plaintiff. Consequently, the defendant issued a s 218 notice against the plaintiff to claim

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the outstanding amount. The plaintiff applied under encl 2 for injunctive relief to restrain defendant from filing winding up petition without judgment and for a declaration that the plaintiff was not responsible for further warranties in respect of the vehicle bought by the defendant. The plaintiff had also applied to amend prayer (b) of the originating summons (encl 2) under encl 14. On the

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other hand, the defendant applied under encl 9 to set aside the ex parte injunctive order granted on 10 March 2015. At the conclusion of the hearing, the court allowed the applications under encls 2 and 14; and dismissed the application under encl 9. The defendant appealed against the decision of the court. The defendant submitted that the plaintiff's application for injunctive relief was academic as the winding up petition was presented. It was further submitted that O 29 rr 1(2B) and 1(2BA) of the Rules of Court 2012 ('the ROC') should be applicable since there was no proper service of encl 4. The defendant also submitted that, as there was no response by the plaintiff to the s 218 notice, the winding up petition was validly presented on 9 March 2015,

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after the expiry of the 21 days period. In reply, the plaintiff submitted that the EWP was voided when the defendant failed to perform the third service contrary to the term of the EWP.

Held, allowing the encl 14; allowing the encl 2 with costs of RM3,000; and dismissing the encl 9 with costs of RM3,000:

- (1) Contrary to the defendant's contention on the non-service of encl 4, the said application was served on the defendants on 10 March 2015 by fax and email. It was misleading to assert that the application was only served on the defendants on 13 March 2015 when the court found service of the same on the defendant was effected twice on 10 March 2015 (by email) and fax on 12 March 2015. The court was of the view that having been served with encl 4, the defendant ought to be present in court instead of giving excuses of non-service. As there was proper service of encl 4, the defendant's argument on the application of the provisions of O 29 rr 1(2B) and 1(2BA) of the ROC did not apply in the context of the present case (see para 11).
- (2) The court agreed with the plaintiff that the case of *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 was similar to the present case in that the defendant had presented the winding up petition. Thus the argument of the defendant that the plaintiff's application for injunctive relief (encl 4) was academic could not be sustained as the winding up petition was presented. The court was of the view that the argument by the defendant that the court had no jurisdiction to grant the injunctive relief was misconceived (see para 12).
- (3) The amount of RM2,973 as claimed by the defendant had been disputed by the plaintiff and the fact that the said sum had been deposited with the plaintiff's solicitor as stakeholders was a proof that the plaintiff was able to pay the alleged debt and there was no issue of the plaintiff's inability to pay its debt as alleged in the s 218 notice. The action of the defendant to enforce the payment of the disputed debt by means of the s 218 notice was mala fide and with the intention of pressuring the plaintiff to pay a disputed debt and was an abuse of the court process (see paras 14–15).
- (4) The defendant informed the court that encl 14 was served on him on 10 April 2015 and he objected to the application made under encl 14 but he did not intend to file any affidavit in reply. As there was no affidavit in reply to rebut the averments in the affidavit in support, the court granted order in term of encl 14 (see paras 17–18).
- (5) Founded on the plaintiff's records, the defendant breached the terms of the EWP at the third service interval when he serviced the vehicle in excess of 2,136km. Based on the chronology of events and substantiated by the documentary proof, the court found that the EWP was voided by

- A the defendant's own breach and the plaintiff was not responsible for the EWP. As such, the defendant ought not to be allowed to take advantage of a situation brought about his own act or omission. Thus, based on the evidence, the plaintiff had discharged its burden of proving that it was entitled to the declaration sought under encl 2 (see paras 20–21).

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[Bahasa Malaysia summary]

- C Defendan telah membeli sebuah kereta daripada plaintiff dengan jaminan untuk dua tahun pertama oleh plaintiff dan dilanjutkan selama tiga tahun di bawah 'Polisi Jaminan Lanjutan' ('PJJ') oleh Allianz General Insurance Co (M) Bhd. Defendan mendakwa kenderaan tersebut masih di bawah jaminan dan menuntut bayaran balik sebanyak RM2,973 sebagai jumlah yang belum dijelaskan daripada plaintiff. Sehubungan dengan itu, defendan mengeluarkan notis s 218 terhadap plaintiff untuk menuntut jumlah yang belum dijelaskan.
- D Plaintiff memohon di bawah lampiran 2 untuk relif injunksi untuk menghalang defendan daripada memfailkan petisyen penggulangan tanpa penghakiman dan untuk satu deklarasi bahawa plaintiff tidak bertanggungjawab untuk jaminan lanjutan berhubung kenderaan yang dibeli oleh defendan. Plaintiff juga telah memohon untuk meminda permohonan (b) saman pemula (lampiran 2) di bawah lampiran 14. Sebaliknya, defendan memohon di bawah lampiran 9 untuk mengetepikan perintah injunksi ex parte yang dibenarkan pada 10 Mac 2015. Pada penutup pendengaran, mahkamah membenarkan permohonan di bawah lampiran 2 dan 14; dan menolak permohonan di bawah lampiran 9. Defendan merayu terhadap keputusan mahkamah. Defendan berhujah bahawa permohonan plaintiff untuk relif injunksi adalah akademik memandangkan petisyen penggulangan telah dikemukakan. Defendan selanjutnya berhujah bahawa A 29 kk 1(2B) dan 1(2BA) Kaedah-Kaedah Mahkamah 2012 ('KKM') seharusnya terpakai kerana tiada serahan wajar lampiran 4. Defendan juga berhujah bahawa, memandangkan tiada jawapan daripada plaintiff berhubung notis s 218, petisyen penggulangan telah sah diserahkan pada 9 Mac 2015, selepas tamat tempoh 21 hari. Sebagai balasan, plaintiff berhujah bahawa PJJ telah dibatalkan apabila defendan gagal melaksanakan penyerahan kali ketiga bercanggah dengan tempoh PJJ tersebut.

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Diputuskan, membenarkan lampiran 14; membenarkan lampiran 2 dengan kos sebanyak RM3,000; dan menolak lampiran 9 dengan kos sebanyak RM3,000:

- I (1) Bercanggah dengan hujahan defendan berhubung ketidakserahan lampiran 4, permohonan tersebut telah diserahkan kepada defendan pada 10 Mac 2015 melalui faks dan emel. Adalah mengelirukan untuk menegaskan bahawa permohonan tersebut hanya diserahkan kepada defendan pada 13 Mac 2015 apabila mahkamah mendapati serahan permohonan kepada defendan telah dilaksanakan dua kali pada 10 Mac

- 2015 (melalui emel) dan faks pada 12 Mac 2015. Mahkamah berpendapat bahawa setelah diserahkan dengan lampiran 4, defendan sepatutnya hadir di mahkamah dan bukannya memberi alasan tentang ketidakserahan. Memandangkan terdapat serahan wajar lampiran 4, hujahan defendan berhubung permohonan peruntukan A 29 kk 1(2B) dan 1(2BA) KKM tidak terpakai dalam konteks kes ini (lihat perenggan 11). A B
- (2) Mahkamah bersetuju dengan plaintif bahawa kes *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 adalah sama dengan kes ini kerana defendan telah mengemukakan petisyen penggulangan. Oleh itu hujah defendan bahawa permohonan plaintif untuk relif injunksi (lampiran 4) adalah akademik tidak dapat dikekalkan memandangkan petisyen penggulangan telah dikemukakan. Mahkamah berpendapat bahawa hujahan oleh defendan bahawa mahkamah tidak mempunyai bidang kuasa untuk membenarkan relief injunksi adalah satu salah tanggapan (lihat perenggan 12). C D
- (3) Jumlah RM2,973 seperti yang didakwa oleh defendan telah dipertikaikan oleh plaintif dan fakta bahawa jumlah tersebut telah didepositkan dengan peguamcara plaintif sebagai pemegang kepentingan adalah bukti bahawa plaintif mampu membayar hutang seperti yang didakwa dan tidak terdapat isu ketidakupayaan plaintif membayar hutangnya seperti yang didakwa dalam notis s 218. Tindakan defendan untuk menguatkuasakan pembayaran hutang tersebut melalui notis s 218 adalah berniat jahat dan dengan niat untuk memberi tekanan kepada plaintif untuk membayar hutang yang dipertikaikan dan merupakan penyalahgunaan proses mahkamah (lihat perenggan 14–15). E F
- (4) Defendan memaklumkan kepada mahkamah bahawa lampiran 14 telah dihantar kepadanya pada 10 April 2015 dan dia membantah kepada permohonan yang dibuat di bawah lampiran 14 tetapi dia tidak berhasrat untuk memfailkan apa-apa affidavit balasan. Oleh kerana tiada affidavit balasan untuk membantah penegasan dalam affidavit sokongan, mahkamah membenarkan perintah mengikut butiran lampiran 14 (lihat perenggan 17–18). G
- (5) Berdasarkan rekod plaintif, defendan melanggar terma-terma PJJ pada selang serahan yang ketiga apabila dia menservis kenderaan yang melebihi 2,136km. Berdasarkan kronologi peristiwa dan disokong dengan bukti dokumentari, mahkamah mendapati bahawa PJJ telah dibatalkan oleh pelanggaran defendan sendiri dan plaintif tidak bertanggungjawab untuk PJJ tersebut. Oleh itu, defendan tidak sepatutnya dibenarkan untuk mengambil kesempatan daripada keadaan yang disebabkan oleh perbuatan atau peninggalan sendiri. Oleh itu, berdasarkan keterangan, plaintif telah melepaskan beban untuk membuktikan bahawa ia berhak untuk pengisytiharan yang dituntut di H I

A bawah lampiran 2 (lihat perenggan 20–21).]

Notes

For cases on declaration, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 6353–6358.

B For cases on injunction to restrain, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3923–4017.

Cases referred to

C *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390; [2002] 4 CLJ 391, HC (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447, SC (distd)

Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation [1978] VR 83, SC (refd)

D *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316, CA (folld)

Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd [1983] 2 MLJ 317, FC (folld)

E Legislation referred to

Companies Act 1965 s 218

Rules of Court 2012 O 29 r 1(2B), 1(2BA)

KC Tang (YM Sin with him) (Raja Ariff & Sin) for the plaintiff.

F *Loo Chay Meng (Nor Hamiah bte Abd Hamid Hasani with him) (Abu Hassan & Assoc) for the defendant.*

Lau Bee Lan J:

G INTRODUCTION

[1] There are three applications involved in this proceedings, two filed by the plaintiff and one filed by the defendant:

H (a) encl 2 is the plaintiff's originating summons for (a) injunctive relief to restrain the defendant and/or his agent from taking any execution proceedings or from filing a winding up petition against the plaintiff in the absence of a judgment; (b) a declaration that the plaintiff is not responsible for the further warranties in respect of the vehicle, Volkswagen Passat CC, registration No BLM 7770; and (c) costs;

I (b) encl 14 is the plaintiff's application is to amend prayer (b) of the originating summons (encl 2) in the following terms: ie 'for a declaration that the plaintiff would not be responsible for the extended warranty of a vehicle of the type Volkswagen Passat CC bearing registration No

BLM 7770 between 26 November 2013 till 12 February 2015' (prayer (a)); and costs to be borne by the plaintiff (prayer (b)); and

- (c) encl 9 is the defendant's application to set aside the ex parte injunctive order granted on 10 March 2015.

[2] Apart from the originating summons filed on 3 March 2015, the plaintiff has filed an application for an ex parte interim order to injunct the defendant from presenting the winding up petition vide encl 4. Enclosure 4 comprised of an undertaking as to damages by the plaintiff (prayer (a) and prayer (b)) for the injunctive relief as follows:

satu perintah bahawa defendan samada melalui diri sendiri atau pun wakil atau pekerja-pekerja atau agen defendan atau mana-mana satu daripada mereka atau dengan apa jua cara lain, dihalang daripada *memfailkan atau menyebabkan untuk difailkan apa-apa petisyen di bawah Akta Syarikat 1965* untuk menggulungkan plaintif yang dinamakan di atas, dan mengambil apa-apa langkah dalam apa-apa bentuk dan/atau apa-apa cara sekalipun terhadap plaintif sehingga keputusan muktamad tuntutan plaintif terhadap defendan ditentukan. (Emphasis added.)

- (a) prayer (b) of encl 4 is similar to prayer (a) of the originating summons except it is more detailed;
- (b) during the hearing of encl 4, learned counsel for the plaintiff, Dato' Sin Yoong Ming told the court:

Court has directed I personally went to the Defendant's law firm, ie M/s Abu Hassan & Associates. I have served on him the OS and Ex-parte application at his office. He called me that the Bundle did not contain the OS (ex-parte). I e-mailed and faxed the entire Notis Permohonan (ex-parte).

I was informed that he had filed the Notis Permohonan Petition against the Plaintiff in Shah Alam High Court yesterday and he give me a copy of the Payment Notice.

For that reason he informed the Court that he will not be present.

- (c) being satisfied that defendant has been duly informed of the hearing which I intended to be heard on an inter parte basis (see affidavit of service affirmed by Dato' Sin on 13 March 2015 (encl 8) I proceeded with the hearing of the encl 4 and heard the arguments for a Fortuna injunction;
- (d) Mr KC Tang (lead counsel) for the plaintiff applied orally to amend prayer (b) of encl 4 to reflect the recent development which the court granted in the following terms ie the words emboldened in line 3 of prayer (b) above is substituted with the words 'meneruskan atau mengambil apa-apa langkah dalam prosiding atau tindakan guaman untuk ...'; and

- A (e) I granted the injunctive order on 10 March 2015 with costs in the cause (see encl 7, fair copy of the injunctive order).

[3] On 15 April 2015 encls 14, 9 and 2 were all heard together and on 5 May 2015 I made the following orders:

- B (a) encl 14 was allowed in terms of prayers (a) and (b);
(b) encl 9 was dismissed with costs of RM3,000 to be paid by the defendant to the plaintiff; and
C (c) encl 2 was allowed in terms of prayer (b) with costs of RM3,000 to be paid by the defendant to the plaintiff.

[4] The defendant has appealed against the aforesaid decisions. Herein below are the reasons for the decisions.

D BRIEF FACTS

- E [5] The plaintiff is a car distributor and seller for Volkswagen cars in Malaysia and has been incorporated under the Malaysian Companies Act 1965 on 25 December 2005. The defendant is a customer to the plaintiff.

- F [6] The defendant bought a Volkswagen Passat CC ('the vehicle') from the plaintiff vide a purchasing order No 03749 dated 14 November 2011 made by FA Wagen Sdn Bhd and was registered as BLM 7770. The vehicle was under a warranty for the first two years by the manufacturer and extended for three years under the 'extended warranty policy ('EWP')' issued by Allianz General Insurance Company (M) Bhd under the certificate No 10AK900018#KP014199.

- G [7] The defendant had issued a s 218 notice dated 12 February 2015 ('third s 218 notice') against the plaintiff premised on the allegation that the vehicle is still under the warranty and claimed remedy of RM2,973 from the plaintiff as an amount outstanding. Earlier on 25 February 2014 and 12 September 2014, the defendant had issued two notices pursuant to s 218 of the Companies Act 1965 for the claimed amount.
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- I [8] The plaintiff had placed money amounting to RM2,973 to the plaintiff's solicitor's account in view of future winding-up proceeding initiated by the defendant.

ARGUMENTS

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Enclosure 9

[9] The defendant contends that (a) as the winding up petition was presented on 9 March 2015, encl 4 would have been academic and the court has no jurisdiction to grant an injunction to restrain further performance; (b) it was discovered that encl 4 was not enclosed when plaintiff made the service on 10 March 2015. Since encl 4 was not served, O 29 r 1(2B) applies and the ex parte order would be deemed to have ‘automatically lapsed’ 21 days thereof ie on 31 March 2015. Under O 29 r 1(2BA), the said ex parte order must be served within seven days thereof and a return date must be fixed before 14 days thereof; (c) the plaintiff, knowing that the winding up petition has been presented should have withdrawn encl 4. Every opportunity must be given to him to be heard and heard properly, with all the cause papers properly served; (d) the plaintiff had committed material non-disclosure or concealment of a material fact to this court in that a demand letter was sent by defendant’s solicitor on 9 February 2015 listing down the reason for his claim of RM2,973. The letter was not disclosed to this court. All the facts stated in the 9 February 2015 letter were never disputed by the plaintiff; (e) since the plaintiff never disputed the defendant’s allegation that the claim for refund of RM2,973 is genuine, s 218 of the Companies Act provided the defendant a remedy and defendant had accordingly complied with the procedure; (f) having heard no response nor having knowledge of any ‘dispute’ to the 9 February 2015 letter and the s 218 notice, the winding up petition was validly presented on 9 March 2015, after expiry of the 21 days period; and (g) it was the plaintiff’s conduct that is highly unprofessional and ‘fraudulent’ to use the ‘first service no chop’ excuse to repudiate the five year warranty, which had induced the defendant to buy the car at RM269,000.

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[10] The plaintiff replies that (a) there is no dispute that the event which triggered the defendant’s s 218 notice dated 12 February 2015 stems from the payment by the defendant for a sum of RM2,973 on 2 February 2015; (b) the EWP was voided when the defendant failed to perform the third service in accordance to the extended warranty policy by Allianz and/or breached the term of EWP; (c) it is clear under the second half under the title ‘exclusion’ which states that the policy does not cover any loss damage on vehicle not serviced in accordance with service requirements of the manufacturer; (d) the plaintiff relies heavily on the *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83 and *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 where the court may apply the principle to prevent abuse of the process of court and similarly to restrain the advertisement of a petition already; and (e) the amount claimed is bona fide disputed.

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A FINDINGS

[11] With respect I am of the view that the contentions of the defendant are without merit. My reasons are these:

- B** (a) I had directed the plaintiff to serve the application for ex parte injunctive relief ('encl 4') to be served on the defendant and I had adjourned the hearing to be heard on *an inter partes basis at 2pm*. Contrary to the defendant's contention on the non-service of the application for ex parte injunctive relief (encl 4), in fact I find that notwithstanding that the said application was not served with the affidavit in support (encl 5) but subsequently upon being alerted by the defendant, soon thereafter the said application was served on the defendant on 10 March 2015 by fax and e-mail as proven by the affidavit of service (encl 8). Further, I find it is misleading of the defendant to assert that the application for ex parte injunctive relief (encl 4) was only served on the defendant on 13 March 2015 when I find service of the same on the defendant was effected twice on 10 March 2015 (by email) and fax on 12 March 2015) (see exhs S3 and S4 in the affidavit of service). I am of the view that having been served with encl 4, the defendant ought to be present in court instead of giving excuses of non-service and of 'I was not even properly dressed and could not had made it in time'. To me, the defendant's statement of 'The non-attendance of the hearing at 2pm was not meant to be disrespectful' is just plain lip service; and
- D**
- E**
- F** (b) in the light of my findings that there was proper service of encl 4, in my considered opinion, the defendant's argument on the application of the provisions of O 29 r 1(2B) and O 29 r 1(2BA) of the Rules of Court 2012 do not apply in the context of the present case.

- G** [12] The injunctive relief sought by the plaintiff is in the nature of a Fortuna injunction. In this regard the principles for a Fortuna injunction propounded in *Fortuna Holdings Pty Ltd* has been well articulated by the Court of Appeal in *Mobikom's* case comprising the two branches of the principle that guide the court in the grant of an injunction at p 322 as follows:

- H** (1) When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process ...

The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

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- (2) ... I consider that there is a second branch of the principle which may apply in situations where the first branch does not.

The second branch applies in cases where the petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

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Further, I agreed with the plaintiff that *Mobikom's* case is similar to the present case in that the defendant has presented the winding up petition (see pp 316 para G and 321 para E). Therefore the argument of the defendant that the plaintiff's application for injunctive relief (encl 4) is academic as the winding up petition was presented cannot be sustained following *Mobikom's* case where the Court of Appeal held otherwise. I am of the view the argument of the defendant that this court has no jurisdiction to grant the injunctive relief is misconceived.

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[13] The defendant relied on the Supreme Court case of *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 particularly on a dicta at p 449 H-I left column; which dicta was also relied on by the learned judge in *Azman & Tay Associates Sdn Bhd v Sentul Raya Sdn Bhd* [2002] 4 MLJ 390; [2002] 4 CLJ 391 at p 399 D-F for the proposition that this court has no jurisdiction to grant the injunction because the winding up petition has been filed. The passage relied on by the defendant reads:

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... the Companies (Winding Up) Rules 1972 require that every petition should be advertised and it is immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding up. Even if the advertisement would in fact cause such damage, this is not a ground to prevent a bona fide petitioner from advertising.

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With respect the case of *Chip Yew Brick Works Sdn Bhd* can be distinguished from the present case. This has best expressed by Gopal Sri Ram JCA in *Mobikom's* case at p 327 as follows:

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The present case must be distinguished from cases such as *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 and *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. These were cases in which no quia timet injunctive relief was sought to restrain the presentation of a winding up petition. They were cases in which the respondent company resisted the petition on the ground that the debt on which the petition was founded was disputed. In other words the fact that the debt was bona fide disputed was raised by way of an answer or defence to the petition. It is in that context that Wan Hamzah SCJ spoke these words in *Chip Yew*:

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whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

A [14] Further I find the amount of RM2,973 claimed by defendant has been
disputed by the plaintiff as can be seen from the title of the plaintiff's solicitors'
letter dated 24 February 2015 addressed to Messrs Abu Hassan & Assoc,
namely, 'Re: Alleged outstanding sum of RM2,973 due to Loo Chay Meng'
B and the fact that the said sum has been deposited with the plaintiff's solicitors
as stakeholders as proof that the plaintiff is able to pay the 'alleged debt' and
there is no issue of the plaintiff's 'inability to pay its debt' as alleged in the s 218
notice. I find the action of the defendant to enforce the payment of the
disputed debt by means of the s 218 notice is mala fide and with the intention
C of pressuring the plaintiff to pay a disputed debt and is an abuse of the court
process.

[15] For the reasons stated I am of the view that the defendant's application
to set aside the order made by the court on 10 March 2015 ordered by the court
D to be heard on an inter partes basis but of which the defendant chose not to be
present ought to be dismissed with costs of RM3,000 to be paid by the
defendant to the plaintiff.

ARGUMENTS AND FINDINGS

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Enclosure 14

F [16] As regards to encl 14, the plaintiff had filed an affidavit in support
affirmed by Lim Ai Shi on 8 April 2015 (encl 15). The grounds for seeking the
proposed amendment is to reflect the real question in dispute and no prejudice
would be caused to the defendant caused by the proposed amendment. The
grounds relied on by the plaintiff included the following which have been
confirmed by Lim Ai Shi at para 3 of the affidavit in support (encl 15):

- G (i) defendan telah pada 11 Februari 2015 menyampaikan satu notis di bawah
seksyen 218 Akta Syarikat 1965 bertarikh 12 Februari 2015;
- (ii) tuntutan defendan adalah dipertikaikan seperti yang dinyatakan di dalam
afidavit sokongan yang difailkan dan defendan tidak mempunyai satu
tuntutan yang sah terhadap plaintif di bawah notis s 218 tersebut;
- H (iii) setahu plaintif, defendan tidak memfailkan apa-apa tuntutan di dalam
mana-mana mahkamah untuk memutuskan tuntutan defendan terhadap
plaintif dan tidak ada sebarang penghakiman yang telah diperolehi;
- I (iv) plaintif adalah sebuah syarikat yang masih giat di dalam perniagaan dan
berkemampuan untuk membayar hutang bila terhutang dan telah
mendepositkan wang sebanyak RM2,973 dibawah protes dengan
peguamcaranya;
- (v) defendan telah menyerahkan notis s 218 dengan niat untuk memaksa
plaintif membayar untuk sesuatu yang dipertikaikan;

- (vi) jika perintah-perintah yang dipohon tidak diberikan seperti yang dipohon, plaintif akan terus mengalami kerugian yang tidak dapat dipampas oleh kos; A
- (vii) waranti oleh plaintif adalah untuk dua tahun sahaja, dan selepas tempoh tersebut adalah untuk tempoh selama tiga tahun dalam program pelanjutan waranti, ataupun 'extended warranty program ('EWP')'; B
- (viii) program pelanjutan waranti ataupun EWP kereta tersebut dikeluarkan oleh pihak Allianz General Insurance Company (M) Bhd, melalui sijil nombor 10AK900018#KP014199 dan plaintif tidak lagi bertanggungjawab; dan C
- (ix) defendan telah memungkirkan terma EWP tersebut kerana tidak membawa kereta defendan untuk diservis pada servis ketiga.

[17] During the hearing of encl 14, the defendant, Mr Loo Chay Meng representing himself through his firm, Messrs Abu Hassan & Assoc, informed the court (a) encl 14 was served on him last Friday (10 April 2015); (b) he objected to the plaintiff's application in encl 14 and (c) he did not intend to file any affidavit in reply. D

[18] As there was no affidavit in reply to rebut the averments in Lim Ai Shi's affidavit in support, I granted OIT of encl 14. E

Enclosure 2

[19] The salient arguments raised by the defendant in submission in respect of the merits of prayer (b) (as amended) of the originating summons (encl 2) are: F

29. My warranty of RM2,973 was not allowed because the reason was '1st service no chop' or as the plaintiff put it 'EWP-VOID – NO proof or service records'. G

30. Now the Plaintiff has admitted in their affidavit the 1st service was carried out at 12016 km (Exh P-10 Affidavit Lim Ai Shi).

31. In the Plaintiff's Encl 1 & Encl 4, they now say 'warranty' void because of late service, and my LND dated 9/2/2015 & Invoice dated 2/2/2015. H

Paragraphs 5 and 7 of the affidavit of Loo Chay Meng affirmed on 19 March 2015 read as follows:

5. Plaintif telah membayar kepada saya RM973.75 ('Refund tersebut') pada 9-9-2014 dan telah menghidupkan 'Warranty' tersebut tanpa syarat sebelum Surat Tersebut. Refund tersebut dibayar oleh Plaintif melalui ejen Plaintif GB Auto atas arahan Plaintif. I

7. Selanjutnya, saya percaya Saman Pemula ini telah menjadi 'Akademik' dan Plaintif mesti menarik balik Saman Pemula ini atau Mahkamah ini hendaklah

- A menolak Saman Pemula ini dengan kos atas sebab saya diberitahu bahawa *Plaintif sendirinya telah sekali menghidupkan semula 'warranty' tersebut pada 14-3-2015* untuk 'Flywheel' dan 'Repair Kit' (for Clutch) di mana jumlah lebih RM5000 tidak dikenakan bayaran kepada saya. (Emphasis added.)
- B [20] With respect I am of the view that the defendant's aforesaid submission cannot be sustained for these reasons.
- C (a) in respect of the vehicle purchased by defendant, the warranty for two years from the manufacturer and extended for a further three years by Allianz from 25 November 2013 until 24 November 2016 (exh P9 of plaintiff's affidavit in support, encl 1);
- D (b) it is not disputed that pursuant to the third s 218 notice dated 12 February 2015 (exh P1 of plaintiff's affidavit in support) the defendant demanded RM2,973 on 13 February 2015 from the plaintiff. This period in question is the period of the extended warranty which was voided by the defendant when the defendant failed to perform the third service in accordance with the EWP of Allianz. This will be apparent from my explanation below;
- E (c) I find that by looking at the EWP warranty by Allianz in exh P9, it is clear under the title 'Exclusion' (in the English and Malay languages), under the English version, it is written:
- F This Policy does not cover any loss damage ... consequence of:
5. not serviced in accordance with Service Requirements of the Manufacturer
...
- G Therefore I find based on the plaintiff's records, the defendant breached the terms of the extended warranty at the third service interval when he serviced the vehicle in excess of RM2,136km as is evident from exh P10 (third row);
- H (d) this was brought to the defendant's attention when the defendant issued the second s 218 notice for the sum of RM973.75 on 12 September 2014 ('exh P4') where as early as 9 September 2014 the defendant was made aware of the breach vide the plaintiff's solicitor's letter dated 9 September 2014 that the extended warranty was voided ('exh P6'). Nothing could be clearer than the contents of the said letter (material part) which I quote verbatim:
- I As you were well informed, the 5 year warranty program covers a year manufacturer's warranty, and on expiration of the same, continues with a 3 year warranty under-written by a third party, Allianz Insurers. One of the fundamental terms and condition of the 5 year warranty program is that the subject vehicle has to be serviced on time in accordance with the service interval stipulated by the manufacturer.

In your clients' case, the subject vehicle breached this fundamental term on its 3rd service interval where mileage was breached by 2136km.

A

As such, this voids the 5 year warranty cover.

- (e) I find that the payment of RM973.75 was made by the third party and not meant to affirm the extended warranty which was voided. This is evident from the letter dated 12 September 2014 from the plaintiff's solicitors to Messrs Abu Hassan & Assoc, exh P7 which categorically stated:

B

While our client's deny your baseless allegations on the annulment of warranty as explained in our letter of 9th September 2014, we are instructed that the service centre in Klang which attended to your client's car is willing to pay your clients the said amount of RM973.75 as claimed of in your Statutory Notice, strictly without prejudice and without admission of liability whatsoever.

C

D

However, please note that any offers of settlement made herein or by any third party is not to be construed as affirming the warranty that was breached, nor does it constitute any admission of liability on the part of our clients.

I am of the view that the defendant's assertion that the said plaintiff's letter is an afterthought is a bare statement. Therefore I agreed with the plaintiff's submission that the defendant accepted the payment by the third party despite having knowledge of the qualification made by the plaintiff in its letter as emboldened above;

E

- (f) based on the chronology of events and substantiated by the documentary proof, I find that the extended warranty was voided by the defendant's own breach and the plaintiff is not responsible for the extended warranty;

F

- (g) based on the evidence adduced, I am of the view that the defendant ought not to be allowed to take advantage of a situation brought about by his own act or omission. For this, I rely on the case of *Poon Guan Sdn Bhd v Sem Siong Industries Sdn Bhd* [1983] 2 MLJ 317. The facts in this case are: the respondents had leased the premises to the appellants/plaintiffs. It was agreed that if the bowling alley of the respondents was closed for reasons beyond their control, they reserved the right to terminate the tenancy by giving three months' notice in advance. The respondents informed the appellants that the bowling alley would be closed and gave notice to the appellants. The evidence showed that the real reason for closing the bowling alley was the heavy financial losses incurred due to bad maintenance and bad location (at p 317 (see headnotes)). The real issue for determination turned on the interpretation of the second limb of para 6 of the tenancy agreement 'or our Bowling Alley is closed for reasons beyond our control'; and

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A (h) at p 320 B, Hashim Yeop A Sani FCJ (as His Lordship then was)
(delivering the judgment of the Federal Court) held:

B The underlying principle there is that unless a contract clearly and specifically
so provides, the court will not construe an avoiding provision contained in it
in such a manner so as to permit a party to take advantage of a situation
brought about by his own act or omission.

C [21] For the reasons stated, I find that the plaintiff has discharged its burden
of proving that it is entitled to the declaration sought as per prayer (b) of the
originating summons as amended.

CONCLUSION

[22] I hereby made the orders referred to in para 3 above.

D *Enclosure 14 allowed; encl 2 allowed with costs of RM3,000 and encl 9 dismissed
with costs of RM3,000.*

Reported by Dzulqarnain Ab Fatar

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